Supreme Court, U.S.
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No. 99-219

In The

Supreme Court of the United States

FRANCISCA CASTILLO, GILBERT CASTILLO, AS ADMINISTRATOR OF THE ESTATE OF JESUS CASTILLO, DECEASED,

Petitioners,

v.

CITY OF ROUND ROCK, TEXAS, OFFICER MICHAEL H. KINCAIDE, (#4101), CORPORAL THOMAS C. JACOBS, (#1404) AND OFFICER SAMMY LEDESMA (#4112),

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

KEVIN W. COLE*
WICKLIFF & HALL, P.C.
400 West 15th Street, Suite 810
Austin, Texas 78701
(512) 476-9880
(512) 320-5638 (fax)
Attorneys for Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Does a police officer violate a person's clearly established constitutional right when the officer places a combative person who resists arrest in the prone position, and applies pressure to the person's back to overcome the resistance, so that the person's hands and/or feet may be cuffed to control the person's resistance and place the person in custody?

Does a routine police procedure violate the *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) standard of objective legal reasonableness when a combative person who resists arrest stops breathing after having been restrained in a prone position with pressure applied to his back so that officers could overcome what is reasonably perceived as continued resistance to arrest, and place cuffs on the person's hands and/or feet to take him into custody?

May an appellate court, in an interlocutory appeal of the denial of a motion for summary judgment based on qualified immunity, determine whether a police officer's use of force meets the *Harlow* standard of "objective legal reasonableness" without violating the rule in *Johnson v. Jones*, 515 U.S. 304 (1995), and *Behrens v. Pelletier*, 516 U.S. 299 (1996), and the finality rule of 28 U.S.C. § 1291 which prohibit interlocutory review of issues of law not separable from the fact determinations necessary to their resolution?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari to review the unpublished *per curiam* decision of the United States Court of Appeals for the Fifth Circuit entered in *Castillo, et al. v. City of Round Rock, Texas, et al.*

JURISDICTION

Although this Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(c), this case does not satisfy the general considerations governing review on a writ of certiorari outlined in Rule 10(a) of the Supreme Court Rules. As discussed in more detail below in the "Reasons to Deny the Petition," the Fifth Circuit's unpublished *per curiam* opinion does not conflict with any decision of another United States court of appeals on any important matter, and has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers.

STATEMENT OF THE CASE

Petitioners' mischaracterization of the summary judgment evidence[1] and blatant attempt to have this

[1] As discussed more fully in "Reasons for Denying the Petition," Petitioners' Petition mischaracterizes the officers' actions as "hog-tying" even though Petitioners never made this argument to the district court, and the evidence is insufficient as a matter of law to conclude that the officers "hog-tied" Jesus Castillo.

Court consider matters outside the summary judgment record[2] compels Respondents to correct the statement of the case found in the Petition. Moreover, Petitioners' failure to present, **with accuracy**, the facts that are essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny this Petition in accordance with Rule 14.4 of the Supreme Court Rules.

This is an appeal from an order filed on February 2, 1998, partially denying summary judgment on the basis of qualified and official immunity. Respondents Kincaid, Jacobs, and Ledesma timely filed their notices of appeal

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[2] Despite Petitioners' erroneous representation to this Court to the contrary, the Fifth Circuit Court of Appeals' Rules do not require that the complete record of the case remain at the trial court during the appeal process. The Fifth Circuit had the benefit of all of the summary judgment evidence that was on file with the district court when it issued its opinion. Petitioners, however, attempted to present evidence outside of the summary judgment record to the Fifth Circuit at oral argument and in their motion for rehearing. Petitioners' App. 6 n.1; Respondents' App. A-2. The Fifth Circuit refused. Respondents' App. A-5. Petitioners now seek to have this Court consider deposition testimony of Michael Kincaid that is outside the summary judgment record by arguing that because the district court, at the summary judgment hearing, overruled an objection to Petitioners' mention of certain deposition testimony that was not part of the summary judgment record, the entire deposition became part of the summary judgment record even though it was not filed with the district court and the portions of the deposition that Petitioners now seek this Court's consideration was never mentioned to the district court at the summary judgment hearing. Petitioners' App. 29-32, 97-100. This Court must likewise refuse Petitioners' invitation to consider matters outside the summary judgment record.

on February 9, 1998. The district court had subject matter jurisdiction over the federal civil rights claims pursuant to 28 U.S.C. § 1331, and over supplemental State law tort claims under 28 U.S.C. § 1367.

The following facts are taken solely from and cite Petitioners' summary judgment evidence, unless otherwise indicated. On January 5, 1995, around 4:30 p.m., the dispatchers for the Round Rock Police Department began receiving citizen reports on its 911 system about a Hispanic male yelling and banging on cars as he crossed Highway 620 at the Interstate 35 by-pass bridge on foot. (R. 819-824.) The dispatchers relayed the information to Ledesma, a patrol officer, who proceeded toward the area in response. *Id.* Kincaid, another patrol officer, informed the dispatcher that he was available and would also respond as he was closer to the area than Ledesma. *Id.* (R. 775-777.) While Ledesma and Kincaid were driving to the location, the dispatchers received another 911 call stating that a Hispanic male was stealing popcorn and a 12-pack of bottled beer from a Texaco station in the same area. (R. 775-777; 819-824.) The dispatcher relayed this information to the officers. *Id.*

Kincaid was the first to locate Jesus Castillo ("Castillo"). It was at approximately 4:33 p.m. and Castillo was walking across the drive thru lanes of a bank near the intersection of Highway 620 and Interstate 35. (R. 775-777.) Castillo, obese, Hispanic and wearing short pants in near freezing weather, matched the description by the 911 callers, and he also had an open beer bottle in one hand and the remainder of a 12-pack of beer in the other. *Id.* Castillo was five feet three inches tall, weighed 248½ pounds, and had been diagnosed with exogenous

obesity. (R. 851; 860.)[3] When Kincaid instructed Castillo to put the beer down, he placed the 12-pack on the ground but proceeded to drink beer from the open bottle rather than putting it down. (R. 775-77.) Castillo raised his hands above his head, with the bottle still in one hand, and stated that someone was "going to die." *Id.* Kincaid perceived this as a threat. *Id.* Kincaid knocked the bottle out of Castillo's hand, thereby disarming him. (R. 775-777.) Castillo then attacked Kincaid. (R. 713; 716; 718; 723; 726; 729.) Kincaid struggled with Castillo but was unable to control him. *Id.* Castillo and Kincaid's struggle went to the ground and then citizen bystanders attempted to aid Kincaid in subduing Castillo. *Id.* The dispatchers received a 911 call from a bank teller reporting that an officer was struggling with a suspect in the bank parking lot and needed help. (R. 819-824.) Kincaid shouted for someone to get on the radio in his vehicle

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[3] Castillo, a 39-year-old high school graduate suffering from schizophrenia, lived at home with his mother. (R. 841.) Castillo had received services from the Williamson County Mental Health Center beginning in August, 1988 because of his history of psychotic symptoms and several psychiatric hospitalizations. (R. 836-37.) Until June 1994, Mellaril was prescribed for his schizophrenia. *Id.* Castillo was not taking medication just prior to his death. (R. 846.) His counselors were reluctant to place him on Mellaril because he told them he drank 4-5 beers a day, 4-5 days a week. *Id.* Nonetheless, Castillo obtained a prescription for Mellaril on January 4, 1995, and filled it on January 5, 1995, the date of his death. (R. 861.) However, he never received that medication. *Id.* None of the officers involved in arresting and restraining Castillo on January 5, 1995 knew anything about his medical history, his mental problems, or that he had not taken his medication in over six months.

and call dispatch for help. (R. 775-777; 815-824.) A female bystander radioed dispatch that Kincaid was struggling to control the suspect and needed assistance. (R. 775-780; 815-824.) When Ledesma arrived on the scene, he also assisted in the attempt to restrain and control Castillo. (R. 775-780; 799-800; 815-824.) Kincaid and Ledesma, with citizen assistance, managed to handcuff Castillo. (R. 775-780.) Corporal Jacobs was less than a minute from the site of the incident when he overheard the citizen radioing that an officer needed assistance. (R. 772-773.) En route to the scene, Jacobs instructed the dispatcher to clear channel 1, over which the call came from Kincaid's radio, and to get help from other law enforcement authorities. (R. 819-821.) When Jacobs arrived on the scene, Kincaid and Ledesma were still struggling to get Castillo under control, though his hands had been cuffed. (R. 772-777.)

Because Castillo continued to kick and yell, Jacobs assisted Kincaid and Ledesma to put flex cuffs on Castillo's legs. *Id.;* (R. 817.) Ledesma went to get the flex cuffs and Kincaid and Jacobs continued to try to restrain Castillo, who kept on kicking and yelling. (R. 772-777; 817.) During this time Jacobs noticed that Kincaid's face and nose were bleeding and radioed the dispatcher to send an ambulance to the scene as an officer was injured. (R. 772-773; 819-821.) Fire Department records reflect that its first responders were dispatched and en route at 1640 (4:40 p.m.) and arrived on the scene at 1642 (4:42 p.m.). (R. 828.) The officers placed leg restraints on Castillo during the two-minute period it took the Round Rock Fire Department first responders to arrive. (R. 772-777.) Castillo kept kicking his legs and yelling at the officers

until his feet were cuffed. *Id.;* (R. 779-800; 804-805; 815-817.) Once Castillo's feet were restrained he stopped struggling, the officers rolled him over, and they noticed that his face was turning blue. *Id.* The entire struggle lasted approximately ten minutes, *i.e.,* from Kincaid's arrival at 4:33 to the arrival of Fire Department's first responders at 4:42. (R. 775, 828, 879.) No mace, club, or stun gun was used. (R. 777.)

The Fire Department first responders arrived on the scene within seconds of when Castillo's legs were restrained and he was rolled onto his side/back. (R. 775-777; 804-805; 815-817.) EMS records indicate that they were dispatched and went en route at 1639 (4:39 p.m.) and arrival at 1642 (4:42 p.m.), arriving within two minutes of restraint of Castillo's legs and turning him over. (R. 869.) Castillo received medical treatment immediately from Round Rock police officers, fire fighters and EMS, but never regained consciousness. (R. 828; 869.) After remaining comatose on life support for approximately one week, Castillo died on January 12, 1995, shortly after he was removed from life support upon the request of his family. An autopsy by the Travis County Medical Examiner revealed that Castillo had an enlarged heart, (R. 698), a pre-existing medical condition that could not have been detected by a reasonable law enforcement officer on January 5, 1995. (R. 364, Defs' Med. Expert Report). The Round Rock Police Department has never had an arrestee die in custody or suffer any significant injury as a result of being placed face down on the ground in the prone position because he or she resisted arrest. (R. 397, Aff. of Raymond Kuhlmann). The Travis County Medical Examiner's report concluded that Castillo died "as a result of

anoxic encephalopathy due to cardio respiratory arrest, due to positional asphyxia, following a struggle necessitating restraint because of a probable drug-related agitated state." (R. 700.)

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's opinion is not in conflict with any other United States Court of Appeals' decision or with any prior Fifth Circuit decision as this case does not involve "hog-tying."

Petitioners contend that Respondents "hog-tied" Jesus Castillo; such a technique is known by law enforcement officers to carry with it a substantial risk of causing death or serious bodily harm and is thus deadly force as a matter of law; and/or, alternatively, that a fact finder should determine whether the "hog-tying" technique is a use of deadly force. For the reasons discussed below, Petitioners arguments fail, thus their Petition should be denied.

A. This Case Does Not Involve "Hog-tying."

The force at issue in this case is distinct from the "hog-tying" discussed in *Gutierrez v. City of San Antonio*, 139 F.3d 441, 443 (5th Cir. 1998). In *Gutierrez*, officers used a privately purchased nylon rope to loop around the arrestee's feet and then connect the arrestee's feet to his handcuffs, "drawing [the] legs backward at a 90-degree angle in an 'L' shape, thereby 'hog-tying' him," and then transporting him in a vehicle in that position. *Id.* The Fifth Circuit issued a "very limited" holding that in a

limited set of circumstances – *i.e.*, when a drug-affected person in a state of excited delirium is hog-tied and placed face down in a prone position – hog-tying could be classified as "deadly force." 139 F.3d at 451. Because of disputed facts regarding whether deadly force was justified under the circumstances, and the undisputed facts not favorable to the officers in *Gutierrez*, the Fifth Circuit concluded that it could not determine whether the hog-tying at issue was objectively reasonable under a Fourth Amendment analysis. *Id.*

In the case at hand, no rope or any other restraint connected the cuffs on Castillo's hands and feet, and no "hog-tie" contorted his body into an L-shape. As soon as the flex-cuffs were placed on Castillo's ankles and his legs were under control, he immediately was turned over. In other words, although the officers cuffed Castillo's hands behind his back, and placed his legs in flex-cuffs when he continued to kick, at no point did they connect the two sets of cuffs – a far more restrictive and dangerous procedure known as "hog-tying."[4]

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[4] The sworn "Declaration of Peter Schare," Petitioners' police expert, is not to the contrary. There is no mention of "hog-tying" in Peter Schare's **sworn** summary judgment testimony. Petitioners' App. 52-58. Schare attached his resume to, and incorporated it into, his sworn declaration. Petitioners' App. 53, 59-64. Petitioners, however, also attached to Schare's sworn declaration pages of an unsigned unsworn preliminary report which Schare did not explicitly incorporate by reference into his sworn declaration. Petitioners' App. 65-96. Such unsigned unsworn testimony is not competent summary judgment evidence, and furthermore, it does not contain any facts which would bring the Castillo incident within the Fifth Circuit's definition of "hog-tying" as set forth in *Gutierrez*.

B. A Law Enforcement Officer's Use of the Prone Position to Restrain Combative Suspects is Not "Deadly Force" as a Matter of Law.

The prone position is a routine police procedure and is one of the more moderate means of subduing an arrestee who is combative and resists arrest. (R. 473.) The type of prone restraint at issue in this case is comparable to the force at issue in *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 1052 (1998) which the Seventh Circuit deemed reasonable under circumstances strikingly similar to those in the instant case. *See* 123 F.3d at 593-94 (noting that "placing someone in a prone position while handcuffed on the floor does not, in of itself, violate the Fourth Amendment"). In fact, *Gutierrez* explicitly distinguished the reasonable force at issue in *Phillips* from the "hog-tying" at issue in *Gutierrez*, 139 F.3d at 450-51. *Phillips*, too, made clear that the force at issue there was not "hog-tying," but a more moderate form of restraint. *See* 123 F.3d at 594. In light of the explicit distinctions made by the Fifth and Seventh Circuits in *Gutierrez* and *Phillips*, Petitioners' attempt to demonstrate a split between those circuit courts lacks merit. Moreover, because the facts of this case are strikingly similar to the *Phillips* case, there is no intra-circuit conflict between the unpublished *per curiam* decision at issue herein and the *Gutierrez* decision.

Petitioners also argue that, despite the holding in *Phillips* regarding the reasonableness of police officers' use of the prone position to control combative suspects, the testimony of their medical expert and use-of-force expert establishes, as a matter of law, that use of the prone position constitutes "deadly force." Pet. 16. This

Court, however, has cautioned that it would be hesitant "to declare a police practice of long standing 'unreasonable' if doing so would severely hamper effective law enforcement." *Tennessee v. Garner*, 471 U.S. 4 (1985). Not only does Petitioners' use of force expert fail to comment on the degree to which banning use of the prone position would hamper effective law enforcement, he does not even acknowledge in his sworn testimony that Castillo was resisting arrest.[5] Petitioners App. 52-58. This Court, however, has held that authorities must be allowed "to graduate their response to the demands of any particular situation." *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985) (quoting *United States v. Place*, 462 U.S. 696, 709 n. 10 (1983)).

The undisputed summary judgment evidence establishes that (1) even after being wrestled to the ground and placed in the prone position, Castillo resisted the officers' and citizens' efforts to handcuff him by keeping his hands beneath himself;[6] (2) even after his hands were

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[5] Similarly, Petitioners do not disclose to this Court in their Petition that Castillo was perceived by the officers as resisting arrest until the point his legs were cuffed. Their description of the issue of deadly force simply refers to "a person's body who has participated in a strenuous activity" being placed in a prone position with his hands cuffed behind him and weight placed on his back. Pet. 16. Again, Petitioners have failed to present, **with accuracy**, the facts that are essential to ready and adequate understanding of the points requiring consideration by this Court.

[6] Eyewitness Annette Becker described Castillo as having on short pants and a black jacket. (R. 729.) The officers and citizens struggling to get Castillo under control had no way of knowing what he might have in his pockets.

pulled from beneath him and cuffed, Castillo continued to kick and to resist arrest, for whatever reason, until the point his legs were flex-cuffed; and (3) the entire struggle lasted approximately ten minutes. (R. 775, 828, 879.) It is also undisputed that Castillo was turned over immediately after his legs were restrained. (R. 799-800; 804-805; 815-817.)

Although Petitioners contend that Castillo was kicking because he could not breathe, whereas the officers believed that he was kicking in order to resist arrest, it remains undisputed that Castillo did, in fact, continue kicking up until the moment his ankles were flex-cuffed. An individual has no clearly established Fourth Amendment right to be free from efforts to bring him under control in the face of ongoing resistance to arrest.[7]

Even assuming the officers were mistaken in their belief that Castillo's kicking was resistance, and that Plaintiffs are correct that the kicking instead indicated Castillo's inability to breathe, the officers' mistaken belief nonetheless was objectively reasonable under the circumstances. Faced with a volatile and extremely tense street

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[7] *Estate of Phillips*, 123 F.3d at 593 ("Restraining a person in a prone position is not, in and of itself, excessive force when the person restrained is resisting arrest."). *See also Mayard v. Hopwood*, 105 F.3d 1226, 1227-28 (8th Cir. 1997) (holding that officers who handcuffed struggling suspect, threw her face down on rear seat of police car, and placed her legs in a hobble restraint when she started kicking in back of car were objectively reasonable "particularly . . . in light of Mayard's resistance," and that no constitutional violation occurred under these circumstances).

scene, and trying to gain control over a large and belligerent suspect who presented a potential threat to community bystanders, to the officers, and to himself, and who continued kicking at the officers despite their best efforts to subdue him, it was entirely reasonable to place him prone on his stomach until they could cuff his ankles and get his legs under control. As long as Castillo continued to resist arrest or reasonably appeared to the officers to be resisting arrest, it was necessary to minimize the danger to the officers and the bystanders by restraining Castillo to the maximum extent possible. Regardless of whether Castillo kicked because he could not breathe, or kicked because he intentionally was resisting arrest, there is no dispute that he did, in fact, kick. Furthermore, Plaintiffs maintain that Castillo was yelling at the officers in Spanish during the struggle, which might indicate to reasonable officers that Castillo not only could breathe, but also had enough breath to yell. (R. 718.) Under these circumstances, it would be reasonable for the officers to perceive Castillo's kicking as resistance and to hold Castillo in a prone position while they continued their efforts to get him under control and into custody.

After viewing all factual discrepancies in favor of Petitioners, the Fifth Circuit concluded as a matter of law that a reasonable officer could have perceived Castillo's kicking, yelling and bloodying Officer Kincaid's nose as hostility and resistance to arrest even if it was in fact a panic reaction to his positional asphyxia. Petitioners' App. 11. Given that officers in this case had to restrain Castillo as he continued kicking, and that they chose not to use guns, billy clubs, choke-holds, hog-ties, or other

weapons, few choices remained. They had little alternative other than to keep Castillo prone until they could stop his kicking and be assured that Castillo no longer posed a danger to the officers or bystanders in the street.[8] The summary judgment record in this case would not permit this Court to hold that a police officer's use of the prone position is an unreasonable use of deadly force as a matter of law.

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[8] Petitioners contend that it was unreasonable for an officer in these circumstances not to have recognized the risks associated with positional asphyxia and not to have taken measures to prevent the condition from occurring. Respondents note that, unlike the hog-tying case, *Gutierrez*, where the summary judgment record included: articles on hog-tying and positional asphyxia, evidence that the articles had been sent to the very police department named in the suit, and evidence suggesting the officers in that case previously had been instructed not to use hog-ties yet disregarded those instructions, *see* 139 F.3d at 448-49, there is no such comparable evidence in the summary judgment record of this case. Petitioners submitted no articles regarding the dangers of restraining someone in a prone position, nor any evidence that such articles had been sent to the Round Rock Police Department, nor any evidence that the officers previously had been told not to use the prone position yet disregarded those instructions. No such evidence exists.

II. An appellate court does not violate the rule in *Johnson v. Jones*, 515 U.S. 304 (1995), and *Behrens v. Pelletier*, 516 U.S. 299 (1996), or the finality rule of 28 U.S.C. § 1291 which prohibit interlocutory review of issues of law not separable from the fact determinations necessary to their resolution, when it determines whether a police officer's use of force meets the *Harlow* standard of "objective legal reasonableness" in an interlocutory appeal of the denial of summary judgment based on qualified immunity.

In *Behrens v. Pelletier*, 516 U.S. 299 (1996) this Court reaffirmed that its decision in *Johnson v. Jones*, 515 U.S. 304 (1995) "permits [a] petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of "objective legal reasonableness." *Behrens*, 516 U.S. at 313. Petitioners argue that there is no final decision in this excessive force case because the question decided is not truly separable from plaintiff's claim. Pet. 22-23. Petitioners, however, misunderstand the significant differences between the objective legal reasonableness standard from *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and the *Graham v. Connor*, 490 U.S. 386 (1989) excessive force standard.

Although the touchstone for qualified immunity (objective legal reasonableness) and the benchmark for determining excessive force (objectively reasonable force) sound alike, the two inquiries are not identical. *Graham*'s multi-factor excessive force standard may permit a substantial degree of latitude and discretion, but it does not afford the same protections as qualified immunity.

Graham has no comparable allowance for reasonably mistaken beliefs about the constitutionality of an officer's conduct. Although *Graham* analyzes the reasonableness of force from the perspective of a "reasonable officer on the scene, rather than with the 20/20 vision of hindsight," the focus remains on the "amount of force that is necessary in a particular situation." 490 U.S. at 396-97 (emphasis added). Qualified immunity, by contrast, focuses on the amount of force that reasonably, albeit mistakenly, *could have been perceived* as constitutionally permissible in light of a particular situation *and* the law as clearly established at the time.

These standards, at first blush, may sound similar, but the two inquiries should not be collapsed merely for the sake of convenience. The inquiries governing excessive force and qualified immunity, though similar, have subtle nuances. More importantly, they address different legal concerns.

It is logical that an analytical gap exists between qualified immunity and excessive force, because the two standards serve different purposes. *Graham* defines the circumstances under which liability for an excessive force constitutional violation will arise. Qualified immunity, by contrast, defines the circumstances under which liability for a constitutional violation will be excused – namely, circumstances where the law is not clearly established at the time, or where an officer reasonably, albeit mistakenly, could have believed his conduct did not violate constitutional rights of which a reasonable officer would have known. Qualified immunity reflects a public policy choice, and it is a creature of compromise. The doctrine balances the need to promote public service and shield officers from

monetary liability in circumstances where they act reasonably, albeit in derogation of the Constitution.

The Fifth Circuit's analysis in this case makes clear that it was deciding the qualified immunity issue. Petitioners based their entire case on the argument that Castillo's undisputed non-stop kicking, yelling and struggling was because of some panic reaction to his positional asphyxia. The Fifth Circuit, however, focused on the issue of whether a reasonable officer **could have perceived** Castillo's actions as continued resistance to arrest. Petitioners' App. 11 (emphasis added). This issue arises and is relevant in a qualified immunity analysis but not in an analysis based solely on a Fourth Amendment violation under *Graham*. *Behrens* expressly authorizes courts of appeals to make such determinations. 516 U.S. at 313. The fact that such an appeal may result in the grant of summary judgment even though existing fact disputes, when viewed in the light most favorable to the non-movant, are ultimately not material to the resolution of the qualified immunity issue, does not mean that appellate courts will have jurisdiction over every appeal. Courts always have jurisdiction to determine their jurisdiction. The Fifth Circuit's procedures for interlocutory appeals do not change that reality.

Petitioners cite to *Colston v. Barnhart*,[9] and *Elliott v. Leavitt*,[10] as evidence that appellate courts lack consistency on the issue of their jurisdiction to decide when it

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[9] 146 F.3d 282 (5th Cir. 1998) (on denial of pet. reh'g *en banc*), *cert. denied*, 119 S. Ct. 618 (1999).

[10] 105 F.3d 174 (4th Cir. 1997) (on denial of pet. reh'g *en banc*), *cert. denied*, 521 U.S. 1120 (1997).

has jurisdiction in an interlocutory appeal of the denial of summary judgment based on qualified immunity. Both the Fifth Circuit in *Colston*, and the Fourth Circuit in *Elliott* held, in *en banc* decisions which this Court refused to review, that they had such jurisdiction over an interlocutory appeal of the denial of summary judgment in a police excessive force case in which the objective legal reasonableness of the officer's actions was decided as a matter of law. Petitioners cite to no other cases in which this precise issue has been decided to the contrary. Thus there is no actual split between the circuits on the matter at issue in this appeal, and the Fifth Circuit's unpublished *per curiam* opinion does not compel this Court to exercise its supervisory power to grant certiorari as there has been no significant departure from the accepted and usual course of judicial proceedings in the Fifth Circuit opinion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

KEVIN W. COLE*
WICKLIFF & HALL, P.C.
400 West 15th Street, Suite 810
Austin, Texas 78701
(512) 476-9880
(512) 320-5638 (fax)
Attorneys for Respondents

**Counsel of Record*

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Fifth Circuit Court of Appeals

Appellants' Response and Objection to Appellees' Motion to Permit Filing of Petition For Rehearing in Present Form A-1

Fifth Circuit Court of Appeals

Order Denying Rehearing in Its Present Form A-6

CASE NO. 98-50163

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FRANCISCA CASTILLO; OLIVIA LOPEZ; JOHN CASTILLO; MARY CARLEEN; FRANCIS DELGADO; LUIZ CASTILLO; GILBERT CASTILLO; RAYMOND CASTILLO; RUSSELL CASTILLO; JOE CASTILLO; PETE CASTILLO; PAT SALAZAR; VICKI SHAW,
Plaintiffs – Counter Defendants – Appellees

v.

CITY OF ROUND ROCK, TEXAS; MICHAEL H. KINCAIDE, Officer, (4101); THOMAS C. JACOBS, Corporal; SAMMY LEDESMA, Officer, (4112)
Defendants – Counter Claimants – Appellants

APPEAL FROM CAUSE NO. A-96-CV-863
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION
Magistrate Judge Alan D. Albright

APPELLANTS' RESPONSE AND OBJECTION TO APPELLEES' MOTION TO PERMIT FILING OF PETITION FOR REHEARING IN PRESENT FORM

TO THE HONORABLE JUDGES OF THIS COURT:

COME NOW the City of Round Rock, Texas, Officer Michael H. Kincaid, Corporal Thomas C. Jacobs, and Officer Sammy Ledesma, in their official and individual capacities ("Appellants"), and file this their response and objection to the Appellees' Motion to Permit Filing of Petition for Rehearing in Present Form. In support of

same, Defendants would show unto the Court the following:

Appellants object to Appellees' Motion to Permit Filing of Petition for Rehearing in Present Form to the extent that it attempts to have this Court consider evidence that is not part of the summary judgment record for this interlocutory appeal. Appendix "2" to Appellee's Petition for Rehearing is a 209 page copy of the Videotaped Deposition of Michael Kincaid (the "Kincaid Deposition") without a signature page or certificate from the court reporter. In their Petition for Rehearing, Appellees specifically cite to excerpts from pages 56-57, 66-68, and 110-111 of the Kincaid Deposition. Petition for Rehearing of Appellees, pp. 4-6. The summary judgment record for this interlocutory appeal, however, contains only pages 1-4, 96-97, 108, 130-131, 141-142, 144-145, 153, 156-157, 160-162, and 210-212 of the Kincaid Deposition, which were submitted by Appellants (*see* Defendants' Appendix in Support of Defendants' Motions for Summary Judgment, Exhibit "G"); and pages 1-4, and 48-50 of the Kincaid Deposition, which were submitted by Appellees (*see* Plaintiffs' Appendix in Support of Plaintiff's Response to Defendants' Motions for Summary Judgment, Exhibit "H").

The Kincaid Deposition excerpts which Appellees offer in support of their motion for rehearing are not part of the summary judgment record. This Court interprets Rule 56 of the Federal Rules of Civil Procedure literally and renders judgment "*forthwith* if the pleadings, depositions, answers to interrogatories, and admissions **on file**, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as a matter of law." *Little v. Liquid Air Corp.* 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*) (bold added). Thus, it is inappropriate, if not sanctionable, for counsel for Appellees to request that this Court consider evidence outside of the appellate record.[1]

Appellants note that Appendices "3" and "4" to the Petition for Rehearing of Appellees are already part of the summary judgment record and, thus, have been and are available for this Court's consideration. *See* R. pp. 685; 684-881. Appellants express no opinion on Appellees' submission of record evidence for the convenience of the Court, although we note that this Court's rules do not allow for such submissions with a petition for rehearing.

WHEREFORE, PREMISES CONSIDERED, Appellants pray that the Court overrule Appellees' motion to permit

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[1] Counsel for Appellees attempt to justify this request by noting that the deposition of Officer Michael Kincaid was "the subject of a great deal of debate at the oral argument." Motion to Permit Filing, p. 2. The primary, if not sole, reason that the debate at oral argument occurred was because the Court recognized that Counsel for Appellees based his argument on evidence not supported by the summary judgment record. Counsel for Appellees' misleading and erroneous representations to this Court that its Appendix 2 (the Kincaid Deposition) was "previously attached as Exhibit H to Plaintiffs' Appendix in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment" – *see* Petition for Rehearing, p. 3 – and that it contains "documents that are included in the transcript," – *see* Motion to Permit Filing, p. 2 – are truly perplexing and disturbing. Nonetheless, even if the evidence were part of the record in this appeal, Appellants contend that it would not be dispositive of any issue addressed in this Court's opinion.

the filing of its Petition for Rehearing in its present form as it does not comply with this Court's rules.

Respectfully submitted,

BICKERSTAFF, HEATH, SMILEY, POLLAN, KEVER & McDANIEL, L.L.P.
1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443

ANN CLARKE SNELL
State Bar No. 18788500
LISA R. ESKOW
State Bar No. 24004638

By: _____
KEVIN W. COLE
State Bar No. 04544500

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellants' Response and Objection to Appellees' Motion to Permit Filing of Petition for Rehearing in Present Form has been sent by facsimile and Certified Mail, Return Receipt Requested to:

Art Brender
Law Offices of
Art Brender
600 Eighth Avenue
Fort Worth, Texas 76104
(817) 334-0274

Robert Haslam
The Haslam Firm
1320 South University,
Suite 804
Fort Worth, Texas 76107
(817) 332-3148

and via Federal Express for delivery on April 8, 1999 to Charles R. Fulbruge III, Clerk of the Fifth Circuit Court of Appeals, 600 Camp Street, New Orleans, Louisiana 70130 pursuant to Fed.R.App.P. 25(a)(2)(B) on this 7th day of April, 1999.

KEVIN W. COLE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50163

FRANCISCA CASTILLO; OLIVIA LOPEZ; JOHN CASTILLO; MARY CARLEEN; FRANCIS DELGADO; LUIZ CASTILLO; GILBERT CASTILLO; RAYMOND CASTILLO; RUSSELL CASTILLO; JOE CASTILLO; PETE CASTILLO; PAT SALAZAR; VICKI SHAW

Plaintiffs – Counter Defendants – Appellees

v.

CITY OF ROUND ROCK, TEXAS; MICHAEL H. KINCAIDE, OFFICER, (4101); THOMAS C. JACOBS, Corporal; SAMMY LEDESMA, Officer (4112)

Defendants – Counter Claimants – Appellants

Appeal from the United States District Court for the Western District of Texas, Austin

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ORDER:

IT IS ORDERED that Appellees' motion to file petition for rehearing in its present form is DENIED. Appellees shall have until April 22, 1999, to file a petition for rehearing in compliance with the rules.

/s/ Jacques L. Wiener, Jr.
JACQUES L. WIENER, JR.
UNITED STATES
CIRCUIT JUDGE

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